JURISDICTION OF LOWER COURTS

The Superior Court of the State of California in and for the City and County of San Francisco had jurisdiction of the charge of first degree murder (allegedly committed in the City and County) under California Constitution Art. VI, Sec. 5 and California Penal Code Sec. 790. These are set forth in Appendix "D". The California District Court of Appeal of the First Appellate District had jurisdiction of an appeal from a judgment of first degree murder, with imprisonment for life committed in San Francisco under California Constitution Art. VI, Sec. 4a and 4b.

REASONS FOR GRANTING WRIT OF CERTIORARI

There are three reasons why certiorari should be granted to review the holding of the District Court of Appeal, overruling constitutional arguments without stating them:

1. The substantive ground that where no evidence supports conviction on a major rather than a minor crime, the same constitutional issue arises as to the *excessive* part of the judgment and sentence as arose as to the entire judgment and sentence in *Thompson v. Louisville*, 362 U.S. 199, 206;

2. Where constitutional issues are involved, they may be raised even after the time for appeal has expired (or after affirmance on appeal). Compare *Herndon v. Lowery*, 301 U.S. 242, with *Herndon v. Georgia*, 295 U.S. 441; *Petition of Carmen*, 165 F.S. 942 with *People v. Carmen*, 43 Cal. 2d 342 and *In re Carmen*,

48 Cal. 2d 851; see also *Mooney v. Holohan,* 294 U.S. 103; *Johnson v. Zerbst,* 304 U.S. 458; *McNeal v. Culver* (Jan. 23, 1961) 5 L. Ed. 445.

3. Where the state courts do not grant a remedy for violation of constitutional rights (especially in criminal cases), the United States Courts will grant a remedy. *Woods v. Nierstheimer,* 328 U.S. 211, 217.

We take up these points in order.

I. THE UNSUPPORTED EXCESSIVE PART OF A JUDGMENT AND SENTENCE IS A DEPRIVATION OF LIBERTY WITHOUT DUE PROCESS OF LAW IN VIOLATION OF THE XIVTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

As we have already mentioned, the District Court of Appeal does not dispute that under California law the evidence fails to show murder of the first degree. *For purposes of decision it assumes this to be true.* (The lower grades of homicide under California law are second degree murder, Pen. C. 189, App'x "D", and manslaughter, Pen. C. 192.1 and 192, Appendix "D".) Consequently, we have the question in its pure form, whether imprisonment for a crime *in excess* of the maximum shown by the evidence raises the same constitutional issues as to the *excess of the sentence,* which arose as to the entire sentence where no crime at all is shown, as in *Thompson v. Louisville,* 362 U.S. 199. The reasoning of *Thompson v. Louisville* points to the conclusion that there is no legal difference between the situation where no crime at all is shown and where it is conceded that the evidence

shows less than the crime for which the defendant has been convicted and imprisoned. This is so because *Thompson v. Louisville*, 362 U.S. 199, bases itself on *De Jonge v. Oregon*, 362 U.S. 199, 206:

> "Just as 'conviction upon a charge not made would be sheer denial of due process', so it is a violation of due process to convict and punish a man without evidence of his guilt."

The quotation within the quotation is from *De Jonge v. Oregon*, 299 U.S. 353, 362. In *De Jonge v. Oregon*, 299 U.S. 353, the question *was* involved whether a man might be convicted on one charge rather than another. So it was held to be an immaterial difference that in *Thompson v. Louisville* the evidence did not support any crime whatever.

In *De Jonge v. Oregon*, 299 U.S. 353, the crime charged was held to involve a deprivation of liberty without due process in that the crime charged in the indictment denied freedom of speech and of assembly. It was suggested, however, that the evidence *perhaps supported a different* crime and that the conviction could and should be upheld on that basis. But here the Supreme Court made the holdings quoted in *Thompson v. Louisville*, 362 U.S. 199, 206:

> "Conviction upon a charge not made would be sheer denial of due process."

In other words, there must be a correspondence between the sentence and the crime charged. And this requirement holds *when it is a matter of picking one of several crimes—not merely where no crime at all is involved.*

Thompson v. Louisville, 362 U.S. 199, 206, quotes and follows the *De Jonge* case, saying that exactly the same constitutional question is presented by the insufficiency of the evidence to support the judgment and sentence as by the insufficiency of the pleadings to support the judgment and sentence. And while it is true that *Thompson v. Louisville* presented only the insufficiency of the evidence to support ***any*** crime, its complete adoption of the rule of *De Jonge v. Oregon,* 299 U.S. 353, 362, indicates that the same rule would be followed where the evidence is insufficient to support the particular crime of which the defendant has been adjudged guilty and for which he has been sentenced. (As already noted, the District Court of Appeal seems to concede this for purposes of argument.) This being so, the excess of the first degree murder sentence above the maximum which the evidence supports, presents the same constitutional problems as were decided in *Thompson v. Louisville,* 362 U.S. 199 and *De Jonge v. Oregon,* 299 U.S. 353. The California District Court of Appeal in effect overruled these constitutional contentions by stating that they were made but ignoring their content, for which reason petitioner submits that a Writ of Certiorari should be granted to the District Court of Appeal of the State of California, First Appellate District, Division Two, to bring up for decision the issue of *due process* which arises in the case, under the authority of the *Thompson* and *De Jonge* cases which, we submit, control it.

II. WHERE CONSTITUTIONAL ISSUES ARE INVOLVED THEY MAY BE RAISED AFTER TIME FOR APPEAL HAS EXPIRED (OR AFTER AFFIRMANCE).

In criminal cases, this court has always held that constitutional issues voiding any part of the judgment and sentence may be raised after the time for appeal has expired or after affirmance on appeal. See the following:

A. Extraordinary remedy granted to enforce federal right, time to appeal having expired without taking of appeal:

McNeal v. Culver (1961) 5 L. Ed. (2d) 445, 447;

Johnston v. Zerbst (1938) 304 U.S. 458, 462.

B. Extraordinary remedy granted to enforce federal right after affirmance on appeal:

Moore v. Dempsey, 261 U.S. 86;

Herndon v. Lowery, 301 U.S. 242 (cf. *Herndon v. Georgia,* 295 U.S. 441);

Petition of Carmen, 165 F. S. 942;

Also, *Mooney v. Holohan,* 294 U.S. 103.

III. IF STATE COURTS GRANT NO REMEDY TO PROTECT FEDERAL RIGHTS IN CRIMINAL CASES, UNITED STATES COURTS WILL DO SO.

If the state courts furnish no remedy to protect against violation of federal rights in criminal cases, the Federal Courts will do so. *Woods v. Nierstheimer,* 328 U.S. 211, 217.

CONCLUSION

It is respectfully submitted that the Petition for Certiorari to the California District Court of Appeal, First Appellate District, Division Two, should be granted.

Dated, San Francisco, California,
August 11, 1961.

GEORGE OLSHAUSEN,
Attorney for Petitioner.

(Appendices "A", "B", "C", "D" and "E" Follow)

(Vol. 189 A.C.A. 329)

In the District Court of Appeal
State of California
First Appellate District

DIVISION TWO

1 Criminal No. 3770

The People of the State of California,
Plaintiff and Respondent,
vs.
Robert Burks,
Defendant and Appellant.

OPINION

This is an appeal from an order denying the petition of Robert Burks for a writ of error *coram nobis* and motion for the reduction of sentence.

The appellant was indicted for first degree murder on July 17, 1958. Trial by jury began on January 5, 1959; during the trial appellant's counsel and the district attorney stipulated that the death of the victim resulted from a gunshot wound from a gun fired by the defendant. Upon submission the jury found him guilty of first degree murder. Thereafter appellant waived his right to jury consideration of the

issue of the penalty which was then determined by the court and on January 22, 1959, the court sentenced him to the state prison for the term prescribed by law. No appeal was taken, and the appellant states his counsel did not inform him that he had a right to appeal.

The appellant's first contention is that the evidence was insufficient as a matter of law to show willful, deliberate and premeditated intent to kill required to sustain the finding of first degree murder. His argument is that the evidence actually showed he was engaged in defending himself. The evidence does not require a conclusion in accord with appellant's views, but more important, it is clear that this contention raises an issue of law which could have been dealt with on appeal. Hence the writ of error *coram nobis* cannot issue. (*People v. Martinez* (1948), 88 Cal. App.2d 767, 772 [199 P.2d 375].)

The appellant's next contention is that his counsel's failure to advise him of his right to appeal constituted deprivation of liberty without due process of law. It is difficult to accept this statement of appellant inasmuch as he was represented at all stages by capable counsel. However, even though we accept the proposition, it does not provide a ground for the issuance of the writ. (*People v. Gennaitte* (1954), 127 Cal.App.2d 544, 548 [274 P.2d 169].)

It has been repeatedly pointed out by our appellate courts that the writ of error *coram nobis* never issues to correct an error of law, nor to redress an irregularity occurring at the trial that could be corrected on

motion for new trial or by appeal. It is issued to correct an error of fact, existing at the time of trial but unknown to the trial court through no fault of the petitioner, and which fact, had it been known, would have resulted in a different judgment, or would have prevented the rendition of the challenged judgment. (See *People v. Reid* (1924), 195 Cal. 249, 255 [232 P. 457, 36 A.L.R. 1435]; *People v. Tuthill* (1948), 32 Cal.2d 819, 821 [198 P.2d 505]; *People v. Martinez, supra,* at 771; *People v. Adamson* (1949), 34 Cal.2d 320, 326 [210 P.2d 13].)

The foregoing matters were presented in briefs which the appellant filed in propria persona. At the time for oral argument, counsel appeared on behalf of appellant and asked for time to review the case and make such argument as might be warranted. Time was granted and briefs have been filed, so we now consider the points thus presented.

Counsel points to that portion of appellant's application which carries the designation "Motion for the Reduction of Sentence" and contends that under such a pleading appellant can at this time and stage of the proceeding question the sufficiency of the evidence. Appellant cites us to Penal Code, section 1265, and contends that the provisions of this section imply that motions of this character lie even though no appeal has been taken. There is no merit in the argument, for section 1265 clearly provides the jurisdiction of the trial and appellate courts, after the issuance of the remittitur, to act with respect to subsequent proceedings in the case, and it confers on the

appellate court that disposed of the appeal the jurisdiction to act with respect to motions to vacate the judgment should any be made thereafter. The jurisdictional basis is entirely lacking here since no appeal was taken, and we are unable by any construction that we may put on the language of said section to develop any implication that lends support to the present proceeding.

The appellant then passes to Penal Code, section 1181, which sets forth the circumstances under which the trial court may grant a new trial, and particularly subdivision 6 thereof wherein the power is given the trial court in the first instance and any appellate court to which the cause may be appealed, instead of ordering a new trial, to modify the verdict, finding or judgment as to the degree of crime. Again we find no support for appellant's proposition, for the scope of the relief under this statute is limited to the pendency of the appeal and the power of the court therein since its purpose is to obviate the necessity of a new trial when the insufficiency of the evidence only goes to the degree of the crime. *(People v. Odle* (1951), 37 Cal.2d 52, 56 [230 P.2d 345].)

It has been established that where such relief is possible because requested during proper proceedings, the statute is only permissive. *(People v. Hill* (1953), 116 Cal.App.2d 212, 216 [255 P.2d 54].)

Further, the appellant's motion does not lie because motions are not independent rights or remedies, but imply a pendency of suits between the parties and are confined to matters collateral to the main objects

of the actions. Although *coram nobis* is properly regarded as a part of the proceeding to which it refers, when it does not lie there is no basis for an allegedly connected motion. (*People v. Sparks* (1952), 112 Cal. App.2d 120, 121 [246 P.2d 64].) In view of our determination that *coram nobis* does not apply, there is no action to which this motion may adhere. The appellant does not contend that the present judgment is void or illegally entered, but merely asserts that it is erroneous, so that even were we to treat this motion as one to vacate, it fails to qualify because the points made could have been presented on an appeal from the judgment. (*People v. Zolotoff* (1941), 48 Cal.App. 2d 360, 364 [119 P.2d 745].)

The arguments with reference to the alleged constitutional questions are ingenious but we are not convinced of their applicability. It is apparent that the appellant should have sought relief for the alleged insufficiency of the evidence through the historic remedial process provided, namely, appeal from the judgment.

Order affirmed.

Shoemaker, J.

Kaufman, P. J., and Draper, J., concurred.

Filed February 21, 1961.

Lawrence R. Elkington, Clerk.

Appendix "B"

In the District Court of Appeal
State of California
First Appellate District

Division Two

People of the State of California, Plaintiff and Respondent, vs. Robert Burks, Defendant and Appellant.	Criminal No. 3770

By the Court:

The Petition for a Rehearing filed in the above entitled cause is hereby denied.

Dated March 23, 1961

Kaufman, P. J.

Filed
Dist. Court of Appeal - First Dist.
Mar 23 1961
Lawrence R. Elkington, Clerk
By.....
Deputy

Appendix "C"

Order Due
April 21, 1961

In the Supreme Court of the State of California

In Bank

The People of the State of California,
Plaintiff and Respondent,
vs.
Robert Burks,
Defendant and Appellant.

Order Denying Hearing

After Judgment by District Court of Appeal
1st District, Division 2, Crim. No. 3770

Appellant's petition for hearing Denied.

Gibson
Chief Justice

Filed
Apr 19 1961
William I. Sullivan, Clerk
By R. Formichi
S. F. Deputy

Appendix "D"

Constitution of the State of California, Article VI, Sec. 5:

The superior courts shall have original jurisdiction in all . . . criminal cases amounting to felony . . . .

Constitution of the State of California, Article VI, Sec. 4a:

The state is hereby divided into three appellate districts, in each of which there shall be a District Court of Appeal . . . .

. . .

The first district shall embrace the following counties: San Francisco . . .

Constitution of the State of California, Article VI, Sec. 4b:

The District Courts of Appeal shall have appellate jurisdiction on appeal from the superior courts (except in cases in which appellate jurisdiction is given to the Supreme Court) in all cases at law in which the superior courts are given original jurisdiction; . . . also, on questions of law alone, in all criminal cases prosecuted by indictment or information, except where judgment of death has been rendered. . . .

California Penal Code, Sec. 17: A felony is a crime which is punishable with death or by imprisonment in the state prison. . . .

California Penal Code, Sec. 187: Murder is the unlawful killing of a human being, with malice aforethought.

California Penal Code, Sec. 188: Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.

California Penal Code, Sec. 189: All murder which is perpetrated by means of poison, or lying in wait, torture, or by any other kind of wilful, deliberate, and premeditated killing, or which is committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, mayhem, *or any* act punishable under Section 288, is murder of the first degree; and all other kinds of murders are of the second degree.

California Penal Code, Sec. 190: Every person guilty of murder in the first degree shall suffer death, or confinement in the state prison for life, at the discretion of *the court or* jury trying the same, and *the matter of punishment* shall be determined as provided in Section 190.1, and every person guilty of murder in the second degree is punishable by imprisonment in the state prison from five years to life.

California Penal Code, Sec. 190.1: The guilt or innocence of every person charged with an offense for which the penalty is in the alternative death or imprisonment for life shall first be determined, without a finding as to penalty. If such person has been found guilty of an offense punishable by life imprisonment or death, and has been found sane on any

plea of not guilty by reason of insanity, there shall thereupon be further proceedings on the issue of penalty, and the trier of fact shall fix the penalty. Evidence may be presented at the further proceedings on the issue of penalty, of the circumstances surrounding the crime, of the defendant's background and history, and of any facts in aggravation or mitigation of the penalty. The determination of the penalty of life imprisonment or death shall be in the discretion of the court or jury trying the issue of fact on the evidence presented, and the penalty fixed shall be expressly stated in the decision or verdict. The death penalty shall not be imposed, however, upon any person who was under the age of 18 years at the time of the commission of the crime. The burden of proof as to the age of said person shall be upon the defendant.

If the defendant was convicted by the court sitting without a jury, the trier of fact shall be the court. If the defendant was convicted by a plea of guilty, the trier of fact shall be a jury unless a jury is waived. If the defendant was convicted by a jury, the trier of fact shall be the same jury unless, for good cause shown, the court discharges that jury in which case a new jury shall be drawn to determine the issue of penalty.

In any case in which defendant has been found guilty by a jury, and the same or another jury trying the issue of penalty, is unable to reach a unanimous verdict on the issue of penalty, the court shall dismiss the jury and either impose the punishment for life

in lieu of ordering a new trial on the issue of penalty, or order a new jury impaneled to try the issue of penalty, but the issue of guilt shall not be retried by such jury.

California Penal Code, Sec. 192: Manslaughter is the unlawful killing of a human being, without malice. It is of three kinds:

1. Voluntary—upon a sudden quarrel or heat of passion.

2. Involuntary—in the commisison of an unlawful act, not amounting to felony.; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection; provided that this subdivision shall not apply to acts committed in the driving of a vehicle. . . .

California Penal Code, Sec. 193: Manslaughter is punishable by imprisonment in the State prison for not exceeding 10 years, except that a violation of subsection 3 of Section 192 of this code is punishable as follows: In the case of a violation of subdivision (a) of said subsection 3 the punishment shall be either by imprisonment in the county jail for not more than one year or in the State prison for not more than five years, and in such case the jury may recommend by their verdict that the punishment shall be by imprisonment in the county jail; in the case of a violation of subdivision (b) of said subsection 3, the punishment shall be by imprisonment in the county jail for not more than one year. In cases where, as authorized in this section, the jury recommends by their verdict that the punishment shall be by impris-

onment in the county jail, the court shall not have authority to sentence the defendant to imprisonment in the State prison, but may nevertheless place the defendant on probation as provided in this code.

California Penal Code, Sec. 1181: When a verdict has been rendered or a finding made against the defendant, the court may, upon his application, grant a new trial, in the following cases only: . . .

6. When the verdict or finding is contrary to law or evidence, but if the evidence shows the defendant to be not guilty of the degree of the crime of which he was convicted, but guilty of a lesser degree thereof, or of a lesser crime included therein, the court may modify the verdict, finding or judgment accordingly without granting or ordering a new trial, and this power shall extend to any court to which the cause may be appealed; . . .

California Penal Code, Sec. 1239: (a) Where an appeal lies on behalf of the defendant or the people, it may be taken by the defendant or his counsel, or by counsel for the people, in the manner provided in rules adopted by the Judicial Council. . . .

Appendix "E"

In the District Court of Appeal
State of California
First Appellate District

DIVISION TWO

1 Criminal No. 3770

The People of the State of California,
Plaintiff and Respondent,
vs.
Robert Burks,
Defendant and Appellant.

APPELLANT'S OPENING BRIEF

The defendant-appellant, Robert Burks, was convicted in the Superior Court of San Francisco (San Francisco Superior Court, Crim. No. 55011) of first degree murder, for the killing of one Alex Wilson. He was sentenced to life imprisonment on January 22, 1959. (See Respondent's Br. p. 1, filed before present counsel appeared in the case.) No appeal was taken from this judgment.

Subsequently, on November 25, 1959, appellant, now in San Quentin Prison, filed in *propria persona*

a motion for reduction of sentence and also a petition for a writ of *coram nobis* in the Superior Court. Both were denied by the trial court on December 1, 1959. The present appeal is from this denial. The appeal was taken in *propria persona*. Present counsel were associated in the case shortly before September 12, 1960, the date set for oral argument. It is the view of counsel now representing appellant that the *Motion for* Reduction of Sentence presents the substantial issues of the appeal.

This motion raises two issues. Its substantive point is that the evidence is as a matter of law insufficient to support a conviction of first degree murder; there is also the procedural question, whether the point can be raised after the time for appeal has passed.

We consider these two questions in reverse order. *First*, we shall show that sufficiency of the evidence to support the charge on which the appellant is imprisoned involves a constitutional question which may be raised at any time. *Second*, the evidence is as a matter of law insufficient to sustain a conviction of first degree murder.

---

1. INSUFFICIENCY OF EVIDENCE TO SUPPORT CHARGE ON WHICH DEFENDANT IMPRISONED, MAY BE RAISED AT ANY TIME.

The point that insufficiency of the evidence to support the sentence may be raised at any time falls into two parts: (A) Constitutional Issues may be raised even after the judgment has become final for purposes of appeal; (B) sufficiency of the evidence to

support the charge on which defendant is imprisoned raises a constitutional question.

A. Constitutional Objections to Judgment May Be Raised at Any Time, Though Judgment Final for Direct Appeal.

It is well settled both in the United States Supreme Court and in California that constitutional infirmities in the judgment may be raised at any time, notwithstanding that the judgment may no longer be subject to direct attack on appeal. (Several of the United States Supreme Court decisions came up from California.)

Cf.:

Mooney v. Holohan, 294 U.S. 103;

Herndon v. Lowery, 301 U.S. 242, after the earlier decision in *Herndon v. Georgia*, 295 U.S. 441;

In re Bell, 19 C.2d 488, 495.

Compare also:

People v. Chessman, 52 C.2d 467.

Penal Code Section 1265 which provides that motions made after an appeal has become final shall be made in the court which has decided the appeal, proceeds from the premise that motions of the present type lie even after direct appeal proceedings have come to an end.

The provision of Penal Code Section 1181(6), providing that reduction of sentence may be granted on a motion for new trial, merely gives the court power to reduce the sentence in ruling on a motion for new trial; it does not say that that is the only time that

the defendant may move for reduction of sentence. Besides, the trial court's right to reduce the sentence on a motion for new trial is broader than that of the appellate court. (*People v. Thomas*, 25 C.2d 880, 905; *People v. Matlock*, 51 C.2d 682, 689; *People v. Todd*, 154 C.A.2d 601-610.) A motion made after the judgment has become final from the standpoint of direct appeal proceedings is limited to the point that the evidence is insufficient as a matter of law. It is therefore narrower than a motion under Penal Code 1181(6).

B. Insufficiency of Evidence to Support Charge on Which Defendant Imprisoned Raises Constitutional Issue.

1. We here consider the insufficiency *as a matter of law* to support the charge on which appellant is imprisoned—i.e., murder of the first degree. That is, resolving all conflicts and all conflicting inferences in favor of the prosecution, the record is still insufficient to show first degree murder. (We develop this argument in detail, infra.)

2. Two United States Supreme Court cases indicate that a constitutional question arises where a prisoner is confined for a crime greater than anything sustained by the evidence. The first is *De Jonge v. Oregon*, 299 U.S. 353, 362, and the second is *Thompson v. Louisville*, 362 U.S. 199, 4 L.Ed.2d 654.

In the *De Jonge* case the precise question was whether the defendant could be convicted of a crime not *pleaded*. The United States Supreme Court held this would be a denial of due process. It used broad language:

(p. 362) "Conviction upon a charge *not made* would be sheer denial of due process." (Emphasis added)

In *Thompson v. Louisville*, 4 L.Ed. 2d 654, the United States Supreme Court held in so many words that the same logic which governs conviction on a crime not pleaded, applies equally to convictions on a crime not proved.

Thompson v. Louisville, 4 L.Ed.2d 654, 659:

> "Thus we find no evidence whatever in the record to support these convictions. Just as 'Conviction upon a charge not made would be sheer denial of due process,' so is it a violation of due process to punish a man without evidence of his guilt."

The court had previously said, (p. 658): "The record is entirely lacking in evidence to support any of the charges."

It is true that in *Thompson v. Louisville* there was no question of a lesser or included offense. The evidence was held insufficient to prove any crime charged. But this clearly makes no difference. First, the sufficiency of the evidence is held to raise exactly the same problem as the sufficiency of the pleading did in *De Jonge v. Oregon*, 299 U.S. 353, and the *De Jonge* case *did* present the problem of several possible crimes. In fact the question was, when the crime charged was unsupported by evidence, whether the conviction might nevertheless be upheld for a crime not charged, which the evidence was thought to support. Yet *that* was held to deny due process of law.

Second, from a logical standpoint, the unsupported excess sentence presents exactly the same problem as a totally unsupported sentence. That is, for instance, if the evidence shows manslaughter and nothing more, and the defendant is imprisoned for murder, the excess of murder above manslaughter raises exactly the same problem as imprisonment where the evidence shows no crime at all. The contention that if the evidence supports any crime at all it yet, as a matter of law, fails to support a conviction of first degree murder, thus involves a constitutional question, which may be raised even after direct appeal proceedings have come to an end.

We now show that the evidence, as a matter of law, fails to support a charge of murder in the first degree.